



SUPREME COURT OF CANADA

CITATION: Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.,
2018 SCC 55

APPEAL HEARD: April 23, 2018
JUDGMENT RENDERED: December 7, 2018
DOCKET: 37566

BETWEEN:

**Yves Brunette, in his capacity as trustee of Fiducie Maynard 2004 and
Jean M. Maynard, in his capacity as trustee of Fiducie Maynard 2004**
Appellants

and

**Legault Joly Thiffault, s.e.n.c.r.l., LJT Fiscalité Inc.,
LJT Corporatif Inc., LJT Conseil Inc., LJT Litige Inc.,
LJT Immobilier Inc., Lehoux Boivin Comptables Agréés, s.e.n.c.,
Marcel Chaput and Fiscaliste M.C. Inc.**
Respondents

OFFICIAL ENGLISH TRANSLATION: Reasons of Côté J.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 54)

Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis,
Gascon, Brown and Martin JJ. concurring)

DISSENTING REASONS:
(paras. 55 to 105)

Côté J.

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BRUNETTE v. LEGAULT JOLY THIFFAULT, S.E.N.C.R.L.

**Yves Brunette, in his capacity as trustee of
Fiducie Maynard 2004 and Jean M. Maynard,
in his capacity as trustee of Fiducie Maynard 2004**

Appellants

v.

**Legault Joly Thiffault, s.e.n.c.r.l.,
LJT Fiscalité Inc., LJT Corporatif Inc.,
LJT Conseil Inc., LJT Litige Inc., LJT Immobilier Inc.,
Lehoux Boivin Comptables Agréés, s.e.n.c.,
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Respondents

Indexed as: Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.

2018 SCC 55

File No.: 37566.

2018: April 23; 2018: December 7.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Civil procedure — Exception to dismiss — Lack of sufficient interest —

Civil liability — Group that owned and operated seniors' residences composed of

corporations controlled by holding company — Corporations declaring bankruptcy as a result of unexpected tax assessment — Bankruptcy of corporations resulting in bankruptcy of holding company and in total loss of value of patrimony of sole shareholder of holding company — Shareholder commencing action for breach of duty to advise against professionals who set up tax structure of group — Whether shareholder has sufficient interest to bring claim — Code of Civil Procedure, CQLR, c. C-25, art. 55, 165(3).

Commercial law — Corporations — Legal personality — Shareholders — Right of action — Group that owned and operated seniors' residences composed of corporations controlled by holding company — Corporations declaring bankruptcy as a result of unexpected tax assessment — Bankruptcy of corporations resulting in bankruptcy of holding company and in total loss of value of patrimony of sole shareholder of holding company — Shareholder commencing action for breach of duty to advise against professionals who set up tax structure of group — Whether shareholder possesses right of action in relation to faults committed against corporation in which it holds shares — Civil Code of Québec, art. 298.

Fiducie Maynard 2004 (“Fiducie”) was the sole shareholder of a holding company that controlled the corporations that comprised Groupe Melior, which owned, renovated, and operated seniors’ residences. In 2009, Revenu Québec issued unexpected notices of assessment against several corporations of Groupe Melior. These notices and the subsequent collection action resulted in the bankruptcy of most

of the corporations and of the holding company. This caused the total loss of value of the patrimony of Fiducie, which was comprised exclusively of shares in the holding company. B and M, acting in their capacity as trustees of Fiducie, commenced an action against a group of professionals (lawyers and accountants) to recover the lost value of Fiducie's patrimony, claiming that they had committed a number of professional faults in setting up the tax structure of Groupe Melior and, in doing so, had breached their duty to advise Fiducie. The professionals moved to dismiss the action for lack of sufficient interest under art. 165(3) of the *Code of Civil Procedure* ("C.C.P."). The motion was allowed by the Superior Court and the action was dismissed. The Court of Appeal unanimously dismissed B and M's appeal.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, **Rowe** and Martin JJ.: The courts below did not err in dismissing Fiducie's claim for lack of sufficient interest under art. 165(3) C.C.P. The principles of procedural and corporate law in Quebec bar shareholders from exercising rights of action that belong to corporations in which they hold shares, unless they can demonstrate a breach of a distinct obligation and a direct injury that is distinct from that suffered by the corporation in question. In this case, since the claim does not establish these requirements, B and M have not demonstrated a direct and personal interest that would allow Fiducie to claim damages from the professionals.

Article 55 *C.C.P.* defines the basic rule of standing in Quebec and sets out the requirement that a party bringing an action must have a sufficient interest therein. The interest required must be direct and personal and cannot, barring an exception at law, be premised on another party's right of action. The existence of a sufficient interest is one of the conditions that define whether or not an action is admissible at law and it is one of the preliminary conditions that individuals must fulfill before a court will consider their claim. It is not presumed by the court; rather, it must be established by the claimant, who must provide a precise statement of facts to underpin the sufficiency of his or her interest in the motion to institute proceedings.

A defendant may challenge the sufficiency of interest of the claimant under art. 165(3) *C.C.P.* at the preliminary motions stage, but this challenge will only succeed where the plaintiff clearly has no interest. Courts must act with prudence before preliminarily dismissing a claim on this basis; however, since a sufficient interest is a condition of admissibility for all claims, courts must be capable of determining its existence and dismiss claims where the alleged interest is insufficient. The scarcity of judicial resources requires that courts be able to dismiss claims that are manifestly unfounded at a preliminary stage. The sufficient interest of the claimant must therefore be capable of determination at the stage of preliminary motions, without the court needing to determine whether the claim is founded in law. In all actions for civil liability, this requires that the sufficient interest of the claimant be established before the court considers the claim on its merits. The facts alleged by

the claimant must relate to the substantive right at issue, since the existence of a sufficient interest cannot be determined in the abstract.

In this case, it was incumbent upon Fiducie to allege facts necessary to demonstrate the sufficiency of its interest in claiming damages for civil liability against the professionals. To assess whether it can succeed, the substantive rules of corporate law under the *Civil Code of Québec* must be considered. Under the civil law of Quebec, shareholders do not possess a right of action in relation to faults committed against a corporation in which they hold shares. Article 298 of the *Civil Code of Québec* recognizes that legal persons such as corporations have a distinct legal personality. Like other claimants with the capacity to act, the corporation itself must exercise its rights of action in its own name. The corollary is that shareholders may not personally exercise a right of action that belongs to the corporation. In *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, the Court recognized that in certain circumstances shareholders may possess their own right of action against the same defendant as the corporation if they can establish (1) that the defendant breached a distinct obligation owed to the shareholders, and (2) that this breach resulted in a direct injury suffered by the shareholders, independent from that suffered by the corporation. The Court did not, however, create an exception to the general rule. Shareholders can have an independent right of action where they establish the essential elements of civil liability in a way that is distinct from the fault and injury caused to the corporation.

In this case, B and M failed to demonstrate that Fiducie had an independent cause of action in civil liability against the professionals. The alleged facts that relate to the first requirement of *Houle* refer primarily to legal obligations owed to the corporations of Groupe Melior and not to Fiducie; accordingly, they do not suffice to give the latter an independent right of action against the professionals as they do not disclose the breach of an independent legal obligation owed to Fiducie. As for the second requirement, the injury alleged by Fiducie to have been caused by the professionals — the bankruptcy and ensuing loss of the seniors’ residence — was suffered by the corporations of Groupe Melior, not directly by Fiducie. The amount claimed by Fiducie as damages for the total loss of value of its patrimony was calculated primarily to reflect the net value of the seniors’ residences owned and operated by the corporations. However, these residences belonged to the corporations and not to Fiducie, although as the ultimate shareholder, it inevitably suffered from the bankruptcy. As a result, the alleged facts do not disclose a distinct injury suffered directly by Fiducie. Although the characterization of an injury as direct or indirect requires an assessment of causation which is typically left to the trial judge, in this case, the alleged facts were not sufficient to establish the required interest of the claimant.

Per Côté J. (dissenting): The appeal should be allowed. The courts below erred in dismissing Fiducie’s motion to institute proceedings (“MIP”) at the preliminary stage.

An action may be dismissed at the preliminary stage, but only if it is clear that the plaintiff has no interest under art. 165(3) *C.C.P.* At this stage, the plaintiff must allege the necessary elements of the substantive right being claimed. To be sufficient to show that an interest exists at the admissibility stage, allegations must, at a minimum, be clear and precise; however, in the case of causation, an allusion is generally sufficient. Where the allegations are not contradicted, the court must assume them to be true. Given the serious consequences of dismissing an action prematurely, the plaintiff must be given an opportunity to be heard on the merits if there is any doubt.

Houle shows that, in certain exceptional circumstances, shareholders may have a right of action distinct from that of the corporation for a loss in the value of their shares, and may therefore have a sufficient interest to bring an action in their own names. For this purpose, the shareholders must allege (i) that there was a breach of a distinct obligation owed to them and (ii) that the breach caused direct personal damage to them.

Thus, the concept of distinct or independent damage is not an additional condition to be met. The shareholder's damage need not be unrelated to that of the corporation. In *Houle*, the Court insisted only on damage that was direct and personal — as required by the *Civil Code of Québec* — and explicitly recognized that a loss in the value of shares may, in exceptional circumstances, constitute such damage. Once the value of shares is at issue, a shareholder's damage cannot be completely

dissociated from that of the corporation. The Court of Appeal therefore erred in this case by requiring that Fiducie allege damage that was entirely distinct from and independent of the damage sustained by the Groupe Melior corporations.

At the preliminary stage, the allegations in the MIP are sufficient to establish that Fiducie has the necessary interest to bring an action. According to the uncontradicted allegations, there were separate contracts of mandate between, on the one hand, Fiducie and the professionals and, on the other hand, the Groupe Melior corporations and the same professionals. It is also alleged in the MIP that the professionals breached their obligations under their mandates with Fiducie, thereby causing direct personal damage to it, that is, the destruction of its trust patrimony. As for the use of the value of the seniors' residences owned by the Groupe Melior corporations as a method of valuation, it is a question that relates solely to the quantum of damages, and not to the very existence of damage. To the extent that there is ambiguity in the allegations with regard to the amount of the damages being claimed, the solution lies in an amendment of the MIP and in the expert evidence that will be presented at trial, not in the death sentence represented by dismissal of the action at the preliminary stage. Where, as in this case, there are sufficient allegations, it is well established that a judge must refrain from deciding a question of fact, or even a question of mixed fact and law, at the preliminary stage unless, in the case of an exception to dismiss based on the plaintiff's clearly having no interest, sufficient evidence is adduced at that stage. Thus, questions of fact, such as the determination of the directness of the damage, must be left to the trial judge and decided after the

relevant evidence has been considered. The rule is the same where fault, a question of mixed fact and law, is concerned. In this case, therefore, it is for the trial judge to determine, after reviewing the evidence, whether the alleged breaches, damage and causal connection are sufficient to establish Fiducie's interest on the merits.

It is clearly premature to dismiss the action at this stage of the proceedings. The scarcity of judicial resources must not become a pretext for limiting access to the courts to cases in which there is a clear chance of success or to plaintiffs whose interest is not in any doubt.

Cases Cited

Cited by Rowe J.

Applied: *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122;
referred to: *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214; *Kingsway, compagnie d'assurances générales v. Bombardier Produits récréatifs inc.*, 2010 QCCA 1518, [2010] R.J.Q. 1894; *Société d'habitation du Québec v. Leduc*, 2008 QCCA 2065; *Paradis v. Association des propriétaires VDA*, 2007 QCCA 1736; *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49,

[2014] 2 S.C.R. 477; *Dominion Cotton Mills Company Limited v. Amyot*, [1912] 2 A.C. 546; *Groupe d'action d'investisseurs dans Biosyntech v. Tsang*, 2016 QCCA 1923; *Backman v. Canadian Imperial Bank of Commerce*, [2004] R.R.A. 776; *Abattoirs Laurentides (1987) Inc. v. Olymel*, 2003 CanLII 8729; *Tardif v. Huot*, [2001] AZ-50082813; *Harpin v. Lessard*, 2000 CanLII 18991; *Cartier v. Tessier*, 1999 CanLII 11919; *Moulin v. Aconvenbec Ltée*, [1990] R.R.A. 577; *Crevier v. Paquin*, [1975] C.S. 260; *Silverman v. Heaps*, [1967] C.S. 536; *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2; *Haaretz.com v. Goldhar*, 2018 SCC 28; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Michaud v. Groupe Vidéotron Ltée*, [2003] R.J.Q. 3087; *St-Paul Fire & Marine Insurance Co. v. Parson & Misiruak Construction Ltd.*, [1996] R.J.Q. 2925; *Pellin v. Bedco, division de Gérodon Inc.*, 2002 CanLII 20301; *3952851 Canada inc. v. Groupe Montoni (1995) division construction inc.*, 2017 QCCA 620; *Groupe d'action d'investisseurs dans Bruneau v. Gespro technologies Inc.*, 2001 CanLII 20199; *Montréal (Ville de) v. Montréal-Ouest (Ville de)*, 2009 QCCA 2172, [2009] R.J.Q. 2729; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45.

Cited by Côté J. (dissenting)

Canada (Attorney General) v. Confédération des syndicats nationaux, 2014 SCC 49, [2014] 2 S.C.R. 477; *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491; *Consoltex*

inc. v. 155891 Canada inc., 2006 QCCA 1347; *Kingsway, compagnie d'assurances générales v. Bombardier Produits récréatifs inc.*, 2010 QCCA 1518, [2010] R.J.Q. 1894; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *3952851 Canada inc. v. Groupe Montoni (1995) division construction inc.*, 2017 QCCA 620; *Acadia Subaru v. Michaud*, 2011 QCCA 1037, [2011] R.J.Q. 1185; *Société d'habitation du Québec v. Leduc*, 2008 QCCA 2065; *Spar Aerospace Ltée v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *St-Eustache (Ville de) v. Régie intermunicipale Argenteuil Deux-Montagnes*, 2011 QCCA 227; *Bohémier v. Barreau du Québec*, 2012 QCCA 308; *Entrepôt International Québec, s.e.c. v. Protection incendie de la Capitale inc.*, 2014 QCCA 617; *Racine v. Langelier*, 2013 QCCS 5657; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bruneau v. Gespro technologies Inc.*, 2001 CanLII 20199; *Agri-capital Drummond inc. v. Mallette, s.e.n.c.r.l.*, 2009 QCCA 1589, [2009] R.R.A. 935; *9227-1899 Québec inc. v. Gosselin*, 2013 QCCS 5036; *Conporec inc. v. Sorel-Tracy (Ville de)*, 2013 QCCS 2789; *Industries Portes Mackie inc. v. Garaga inc.*, 2007 QCCS 3304; *Desrochers v. EDC-Exportation et développement Canada*, 2007 QCCS 3032; *Besner v. Friedman & Friedman*, 2004 CanLII 14237; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Montréal (Ville) v. Lonardi*, 2018 SCC 29; *Fanous v. Gauthier*, 2018 QCCA 293; *Weinberg v. Ernst & Young LLP*, 2003 CanLII 33911; *Weinberg v. Ernst & Young LLP*, [2003] J.Q. n° 14375 (QL); *Côté v. Rancourt*, 2004 SCC 58, [2004] 3

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Civil Code of Lower Canada.

Civil Code of Québec, arts. 298, 301 to 303, 1458, 1607, 1611.

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APPEAL from a judgment of the Court of Appeal of Quebec (Morissette, Bich and Hogue JJ.A.), 2017 QCCA 391, [2017] AZ-51373221, [2017] J.Q. n° 2229 (QL), 2017 CarswellQue 1511 (WL Can.), affirming a decision of Mayrand J., 2015 QCCS 3482, [2015] AZ-51199707, [2015] J.Q. n° 6901 (QL), 2015 CarswellQue 7213 (WL Can.). Appeal dismissed, Côté J. dissenting.

Doug Mitchell, Jean-Michel Boudreau and François Goyer, for the appellants.

Katherine Delage, Nick Krnjevic and Ann-Julie Auclair, for the respondents Legault Joly Thiffault, s.e.n.c.r.l., LJT Fiscalité Inc., LJT Corporatif Inc., LJT Conseil Inc., LJT Litige Inc. and LJT Immobilier Inc.

Neil A. Peden, Caroline Biron and Marie-Pier Cloutier, for the respondent Lehoux Boivin Comptables Agréés.

No one appeared for the respondents Marcel Chaput and Fiscaliste M.C. Inc.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. was delivered by

ROWE J. —

I. Introduction

[1] This appeal raises two issues that call upon the Court to reaffirm fundamental principles of procedural and corporate law. The first relates to the rules of standing under the Quebec *Code of Civil Procedure*, CQLR, c. C-25 (“former *C.C.P.*”), now *Code of Civil Procedure*, CQLR, c. C-25.01 (“new *C.C.P.*”), and requires the Court to clarify what it takes to dismiss an action for lack of “sufficient interest” under art. 165(3) of the former *C.C.P.* (art. 168(3) of the new *C.C.P.*). The second relates to the distinct legal personality of corporations and requires the Court to reaffirm why shareholders do not possess a right of action under the *Civil Code of Québec* (“*C.C.Q.*”) in relation to faults committed against the corporation in which they hold shares. In my view, the application of fundamental principles leads to the conclusion that the appeal should be dismissed.

II. Facts

[2] The appellants are Mr. Yves Brunette and Mr. Jean M. Maynard, acting in their capacity as trustees of Fiducie Maynard 2004 (“Fiducie”). Fiducie was the sole shareholder of 9143-1304 Québec inc., a holding company which controlled — in whole or in part — the corporations that comprised Groupe Melior. Prior to 2010, Groupe Melior owned, renovated, and operated seniors’ residences and, by all accounts, was successful.

[3] The success of Groupe Melior was cut short by two events that strained the finances of its member corporations. First came the discovery that Groupe Melior’s vice-president had committed fraud worth \$1.8 million against the corporations. Second, Revenu Québec issued unexpected notices of assessment against several corporations of Groupe Melior in 2009. These notices — and the collection action that accompanied them — resulted in the bankruptcy of most of the Groupe Melior corporations, of 9143-1304 Québec inc. and of Mr. Maynard. This in turn caused the total loss of value of the patrimony of Fiducie, which was comprised exclusively of shares in 9143-1304 Québec inc.

[4] The appellants instituted proceedings to recover the lost value of Fiducie’s patrimony from the respondents, a group of lawyers and accountants comprised of Legault Joly Thiffault, s.e.n.c.r.l.; LJT Fiscalité Inc.; LJT Corporatif Inc.; LJT Conseil Inc.; LJT Litige Inc.; LJT Immobilier Inc.; Lehoux Boivin Comptables Agréés, s.e.n.c.; Marcel Chaput and Fiscaliste M.C. Inc. The appellants claimed that the respondents committed a number of professional faults in setting up

the tax structure of Groupe Melior and, in doing so, breached their duty to advise Fiducie. The appellants alleged, *inter alia*, that the tax structure set up by the respondents was not compliant with legislation and that it exposed the corporations to unexpected tax liability. According to the appellants, these faults led to the bankruptcy of most of the Groupe Melior corporations, the bankruptcy of 9143-1304 Québec inc., and the total loss of value of Fiducie's patrimony. The appellants sought damages totalling \$55,000,000 — calculated in essence based on the net value of seniors' residences owned by Groupe Melior by the end of summer 2008 — and a reimbursement of extrajudicial fees worth \$405,000. Mr. Maynard who was the director of several corporations of Groupe Melior as well as the trustee and beneficiary of Fiducie also claimed \$100,000 in damages for moral injury from the respondents.

III. Judicial History

A. *Superior Court, 2015 QCCS 3482*

[5] The respondents moved to dismiss the action for lack of sufficient interest under art. 165(3) of the former *C.C.P.* They argued that Fiducie did not have a sufficient interest to bring a claim in relation to faults committed against the Groupe Melior corporations. They further argued that, as Fiducie was the sole shareholder of a holding company that was itself a shareholder of Groupe Melior, it could not assert a right of action that belonged solely to the corporations of Groupe Melior.

[6] Justice Mayrand of the Superior Court agreed with the respondents. She dismissed the action on the basis that the appellants did not have a sufficient interest to claim damages from the respondents based on the lost value of real estate assets belonging to the Groupe Melior corporations. In her view, Fiducie could not claim damages for faults committed against the Groupe Melior corporations. Citing *Foss v. Harbottle* (1843), 2 Hare 460, 67 E.R. 189 (H.L.); *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; and *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, she explained that shareholders do not have a cause of action in relation to faults committed against the corporation by third-party defendants: para. 42. Rather, shareholders only have a sufficient interest to bring a claim if the third-party defendant breached a distinct legal obligation owed to the shareholders and if the shareholders suffered an injury distinct from those suffered by the corporation: para. 43.

[7] In this case, Justice Mayrand found that the appellants' Re-re-amended and Particularized Motion to Institute Proceedings ("Motion to Institute Proceedings") failed on both counts. First, it did not disclose the breach by the respondents of a distinct obligation owed to Fiducie in its capacity as shareholder: paras. 63-64. Rather, the alleged faults pertained solely to the tax structure of the Groupe Melior corporations and failed to reflect a distinct legal obligation owed to Fiducie. Second, even if it had disclosed the breach of a distinct legal obligation, the Motion to Institute Proceedings failed to raise a distinct injury suffered by Fiducie: para. 66. As the damages being claimed were based on the net value of real estate

assets belonging to Groupe Melior (and not Fiducie), Fiducie had failed to allege an injury distinct from that suffered by the Groupe Melior corporations. In Justice Mayrand's view, this was fatal to Fiducie's claim.

B. *Quebec Court of Appeal, 2017 QCCA 391*

[8] The Quebec Court of Appeal unanimously agreed with Justice Mayrand and upheld the dismissal of the claim for lack of sufficient interest: para. 19 (CanLII). Justices Morissette, Bich and Hogue reaffirmed that, as a general rule, the shareholders of a corporation have no cause of action for an injury caused to the corporation: para. 20. This rule is equally applicable under the common law as it is under the civil law of Quebec: para. 22. Citing *Houle*, the Court of Appeal nevertheless acknowledged an exception to this rule where shareholders can show that they have suffered direct injury that is distinct from that suffered by the corporation and that this injury flowed from the breach of a distinct legal obligation owed to the shareholders: para. 23.

[9] In this case, the Court of Appeal found that Fiducie was effectively seeking damages for the value lost from its patrimony, which equalled the net value of the seniors' residences owned by the Groupe Melior corporations: para. 25. The court held that, while the Groupe Melior corporations (or their trustees in bankruptcy) could have instituted proceedings against the respondents for these damages, the fact that they did not was insufficient to give Fiducie the right to bring its own claim against the respondents: para. 26. As the damages claimed by Fiducie were the result

of injuries that were neither direct nor distinct from those suffered by the Groupe Melior corporations, the court concluded that Fiducie had no legal interest sufficient to ground its claim against the respondents: para. 28. The court also rejected the appellants' subsidiary argument for investment losses on the basis that the appellants failed to allege these losses as part of a specific claim: paras. 30-31.

IV. Issues

[10] The appeal raises a single question: did the courts below err in dismissing Fiducie's claim for lack of sufficient interest under art. 165(3) of the former *C.C.P.*? To answer this question, this Court must consider both the principles of standing under the *C.C.P.* and the rules that limit the right of shareholders to seek compensation for faults committed against a corporation in which they hold shares. I turn first to the procedural issue under the *C.C.P.* before addressing the substantive question of corporate law under the *C.C.Q.*

V. Analysis

A. *Standing Under the Code of Civil Procedure*

(1) "Sufficient Interest"

[11] Article 55 of the former *C.C.P.* — which corresponds to art. 85 of the new *C.C.P.* — defines the basic rule of standing in Quebec. It states that:

55. Whoever brings an action at law, whether for the enforcement of a right which is not recognized or is jeopardized or denied, or otherwise to obtain a pronouncement upon the existence of a legal situation, must have a sufficient interest therein.

[12] I note at the outset that the *C.C.P.* does not elaborate on the meaning of “sufficient interest”: C. Piché, *Droit judiciaire privé* (2nd ed. 2014), at p. 228. Its meaning must therefore be drawn from the jurisprudence. In Quebec, the leading case remains *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491, in which the Court of Appeal stated, at p. 493:

[TRANSLATION] Interest is the benefit the plaintiff will derive from the proceeding he or she brings, assuming that it is well founded. Except in the exceptional cases specifically provided for by law, the general legal rule is that, to be sufficient, the interest must be direct and personal, among other things. [Emphasis added.]

[13] Drawing on this definition, this Court has stated that the interest required by art. 55 must be a “legal, direct, personal, acquired and existing interest”: *Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at paras. 37-38, citing D. Ferland and B. Emery, *Précis de procédure civile du Québec* (3rd ed. 1997), vol. 1, at pp. 89 et seq.; *Jeunes Canadiens*, at p. 493; see also *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 44; *Kingsway, compagnie d’assurances générales v. Bombardier Produits récréatifs inc.*, 2010 QCCA 1518, [2010] R.J.Q. 1894, at para. 21; *Société d’habitation du Québec v. Leduc*, 2008 QCCA 2065, at para. 14 (CanLII).

[14] In the context of an action in civil liability, this typically means that, “to have the necessary interest to bring an action, a person must have sustained personal injury”: *Bou Malhab*, at para. 44. This requirement is confirmed by the rules respecting damages in Quebec. As this Court noted in *Bou Malhab*, “the rules of civil liability in the *C.C.Q.* provide that injury is compensable if it is personal to the plaintiff. The purpose of compensation is to put the victim back in the situation he or she was in prior to the injury. The wording of arts. 1607 and 1611 *C.C.Q.* confirms that the compensated injury must be personal to the creditor of the right to compensation”: para. 47. This coherence with the *C.C.Q.* reinforces the conclusion that the “sufficient interest” at issue under art. 55 of the former *C.C.P.* must be direct and personal and cannot, barring an exception at law, be premised on another party’s right of action.

(2) Lack of “Sufficient Interest”

[15] The existence of a sufficient interest is one of the conditions that define whether or not an action is admissible at law: *Jeunes Canadiens*, at p. 493; see also Piché, at p. 228. Along with the question of legal capacity to act, it completes a set of preliminary conditions that individuals must generally fulfill before a court will consider their claim. An absence of sufficient interest can therefore be raised *proprio motu* by the court, which can lead to the claim being dismissed under art. 462 of the former *C.C.P.*: *Jeunes Canadiens*, at p. 493.

[16] As one of the necessary conditions of admissibility, the existence of a sufficient interest is not presumed by the court; it must be established by the claimant, who must allege the necessary facts to underpin the sufficiency of his or her interest in the Motion to Institute Proceedings: *ibid.*, at p. 494. To this end, vague and general allegations of fact are insufficient. The claimant must rather provide a *precise* statement of facts, as required by the general rules concerning written pleadings under art. 76 of the former *C.C.P.* (art. 99 of the new *C.C.P.*).

[17] For this reason, the sufficiency of the interest alleged by the claimant is open to being challenged for failing to meet the requirements of the *C.C.P.* To this effect, art. 165(3) of the former *C.C.P.* — art. 168(3) of the new *C.C.P.* — provides the procedural basis for the defendant to bring this challenge at the stage of preliminary motions. It states:

165. The defendant may ask for the dismissal of the action if:

- (1) There is *lis pendens* or *res judicata*;
- (2) One of the parties is incapable or has not the necessary capacity;
- (3) The plaintiff has clearly no interest in the suit;
- (4) The suit is unfounded in law, even if the facts alleged are true.

[18] I note that the exception to dismiss under art. 165(3) will only succeed where the plaintiff *clearly* has no interest. Courts are therefore called upon to act with prudence before preliminarily dismissing a claim on this basis: *Leduc*, at para. 15; *Paradis v. Association des propriétaires VDA*, 2007 QCCA 1736, at para. 5 (CanLII).

This Court issued a similar call for caution in the context of preliminary motions to dismiss in *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, [2014] 2 S.C.R. 477, by stating that “[d]ismissing an action at a preliminary stage can have very serious consequences. . . . The courts must therefore be cautious in exercising this power”: para. 17.

[19] Nevertheless, a sufficient interest being a condition of admissibility for all claims, it follows that courts must be capable of determining its existence and, where appropriate, dismiss claims where the alleged interest is insufficient. This implies that the sufficient interest of the claimant must be capable of determination at the stage of preliminary motions, without the court needing to determine whether the claim is founded in law. Rather, the court is required to make inferences and draw conclusions about whether or not the claimant has a sufficient interest. In all actions for civil liability, this requires that the sufficient interest of the claimant be established before the court considers the claim on its merits — that is, before the court makes any final determination regarding the essential elements of fault, injury, and causation. As a matter of logic, this analysis on the merits will be necessary only where the preliminary condition of sufficient interest is met.

[20] If the sufficiency of his or her interest is challenged by the defendant under art. 165(3) of the former *C.C.P.*, the claimant has the opportunity to respond by providing additional facts to demonstrate that interest. Unlike motions under art. 165(4) of the former *C.C.P.*, however, the court is not required to treat the facts

alleged by the claimant as true for the purposes of the motion: *Leduc*, at para. 16. Nor is the court bound to accept the characterization of the facts alleged by the claimant. For this reason, the claimant may place before the court evidence to support alleged facts if the defendant raises art. 165(3) of the former *C.C.P.* and claims that the allegations alone are insufficient to establish the sufficient interest required by art. 55: *ibid.*

[21] For the court to determine the existence of a sufficient interest under art. 55 of the former *C.C.P.*, the facts alleged by the claimant must relate to the substantive right at issue. This is so because the existence of a sufficient interest cannot be determined in the abstract. As this Court noted in *Noël*, at para. 38:

However, the concept of procedural interest [under art. 55] refers to the substantive right. . . . The existence of an interest in bringing a judicial proceeding depends on the existence of a substantive right. It is not enough to assert that a procedure exists. A right enforceable by the courts must be asserted. This understanding of the concept of interest thus calls for consideration of the substantive law on which the cause of action is based. This is the nub of the case at bar.

[22] In this case, it was incumbent upon Fiducie to allege facts necessary to demonstrate the sufficiency of its interest in claiming damages for civil liability against the respondents. The respondents moved to dismiss Fiducie's claim for lack of sufficient interest under art. 165(3) of the former *C.C.P.* on the basis that, as an indirect shareholder of the Groupe Melior corporations, Fiducie had no right to claim losses equivalent to the value of the real estate assets that had belonged to Groupe Melior. To assess the merits of this argument, we must turn to the substantive rules of

corporate law under the *C.C.Q.* to assess whether Fiducie alleged facts necessary to demonstrate the sufficiency of its interest in claiming damages from the respondents.

B. *Principles of Corporate Law Under the Civil Code of Québec*

[23] The courts below dismissed Fiducie's claim on the basis that it could not seek damages against the respondents based on a right of action belonging to the Groupe Melior corporations. This conclusion follows from fundamental principles of corporate law. In what follows, I first address why shareholders, under the civil law of Quebec, do not possess a right of action in relation to faults committed against a corporation in which they hold shares. I then address what has been stated, mistakenly, to be an exception to this rule in *Houle*.

[24] I note that the appellants placed significant emphasis on the specificity of the civil law. They urged the Court against the wholesale adoption of the common law rule set out in *Foss v. Harbottle*, which categorically bars shareholder recovery for faults committed against a corporation. Despite the fact that the principles established in that decision have been recognized to be applicable in Quebec since *Dominion Cotton Mills Company Limited v. Amyot*, [1912] A.C. 546 (P.C.), at p. 552, the appellants submitted that the rule set in *Foss v. Harbottle* is incompatible with basic principles of the *C.C.Q.*: A.F., at paras. 34-40 and 50-59. With respect, this argument misses the mark. The decisions of the Superior Court and the Court of Appeal dismissing the claim for lack of interest are firmly grounded in civil law principles. In certain cases, the civil law produces a conclusion similar to that which

would arise under the common law. This is one such case. As this Court has noted, there is often “a striking similarity between the civil law and the common law approaches”: *Bou Malhab*, at para. 38. This similarity, where it is premised on principles proper to each legal system, in no way detracts from the coherence and integrity of either.

(1) The General Principle of Distinct Legal Personality

[25] The *C.C.Q.* recognizes that legal persons such as corporations have a distinct legal personality (art. 298) and a distinct patrimony (art. 302). As with all legal persons, corporations “have full enjoyment of civil rights” (art. 301) and the “capacity to exercise all their rights” (art. 303). Read together, these provisions lead to the conclusion that the right of action of a corporation belongs to the corporation itself. Like other claimants with the capacity to act, the corporation itself must exercise its rights of action in its own name. The corollary is that shareholders may not personally exercise a right of action that belongs to the corporation: P. Martel, *La société par actions au Québec* (loose leaf ed.), vol. 1, at para. 1-28.

[26] Courts in Quebec have applied these principles consistently. As a consequence, the jurisprudence has barred shareholders from personally instituting proceedings against third parties based on rights of action belonging to the corporation in which they hold shares: see e.g. *Houle*, at p. 182; *Groupe d'action d'investisseurs dans Biosyntech v. Tsang*, 2016 QCCA 1923, at paras. 23-27 (CanLII); *Backman v. Canadian Imperial Bank of Commerce*, [2004] R.R.A. 776

(C.A.), at pp. 797-98; *Abattoirs Laurentides (1987) inc. v. Olymel*, 2003 CanLII 8729 (Que. Sup. Ct.), at paras. 129-34; *Tardif v. Huot*, [2001] AZ-50082813 (Que. Sup. Ct.); *Harpin v. Lessard*, 2000 CanLII 18991 (Que. Sup. Ct.); *Cartier v. Tessier*, 1999 CanLII 11919 (Que. Sup. Ct.); *Moulin v. Aconvenbec Ltée*, [1990] R.R.A. 577 (Que. Sup. Ct.), at p. 580; *Crevier v. Paquin*, [1975] C.S. 260 (Que.), at p. 264; *Silverman v. Heaps*, [1967] C.S. 536 (Que.), at p. 539.

[27] The benefits of incorporation come with a corresponding limit on the rights of shareholders: *Houle*, at p. 178. It would be incoherent — and indeed, unjust — for shareholders to benefit from limited liability while at the same time gaining a right of action in relation to faults committed against the corporation in which they hold shares: *Martel*, at para. 1-28; see also *Silverman v. Heaps*, at p. 539. The corporate veil is impermeable on both sides; just as shareholders cannot be liable for faults committed by the corporation, so too are they barred from seeking damages for faults committed against it: *Houle*, at pp. 177-80; see also F. Pérodeau, “Le sort réservé à la réclamation d’un actionnaire pour la perte de valeur de ses actions : une revue de la jurisprudence québécoise” in Barreau du Québec, vol. 255, *Les dommages en matière civile et commerciale* (2006), at pp. 5-6.

[28] The application of this rule under the civil law of Quebec does not result from the undue incorporation of common law principles. As discussed, corporations have a distinct legal personality under the *C.C.Q.* Like all claimants, they must have a direct and personal interest in a matter before instituting proceedings under art. 55 of

the former *C.C.P.* In the context of civil liability, this means the corporation itself must have suffered an injury. In such cases, the cause of action belongs to the corporation itself and not to its shareholders, who are distinct legal persons under the *C.C.Q.*

(2) The “Exception” in *Houle*

[29] In *Houle*, this Court reaffirmed that shareholders cannot institute proceedings in relation to faults committed by a third-party defendant against a corporation as the right to do so belongs to the corporation itself: pp. 177-80. The Court recognized, however, that in certain circumstances shareholders may possess *their own right of action* against the same defendant: pp. 180-87. In such cases, the shareholders must establish (1) that the defendant breached a distinct obligation owed to the shareholders, and (2) that this breach resulted in a direct injury suffered by the shareholders, independent from that suffered by the corporation: *ibid.*, at pp. 182 and 186; see *Biosyntech*, at para. 30.

[30] The Court in *Houle* did not create an exception to the general rule barring shareholders from recovering damages in relation to faults committed against the corporation. Rather, the Court simply reiterated the essential elements of civil liability in Quebec civil law — fault, injury, and causation — and held that shareholders can have an independent right of action where they establish the existence of each element in a way that is distinct from the fault and injury caused to the corporation: *Houle*, at p. 182; see also Pérodeau, at p. 44.

[31] With regard to the element of injury, the discussion in *Houle* highlights that, in most cases where faults are committed against the corporation, shareholders suffer only an indirect injury: pp. 185-86. As the *C.C.Q.* allows the recovery of damages for direct injuries only (art. 1607), it follows that claims to recover from such an injury will fail. Hence the necessity for shareholders to demonstrate the existence of an independent fault and a direct injury, both of which are distinct from that suffered by the corporation. While it is true that Justice L’Heureux-Dubé did not use the word “distinct” to qualify the injury of the shareholders, she highlighted the need for direct damage, “. . . besides or beyond and independently of any damage the company itself may have incurred”: *Houle*, at p. 186. In my view, direct damage that is independent of the damage suffered by the corporation should, for the sake of clarity, be characterized as distinct. As such, the necessity for the injury to be “distinct” reiterates rather than departs from the principles established in *Houle*.

[32] Contrary to the argument put forward by the appellants, neither the Superior Court nor the Court of Appeal dismissed the claim through an improper application of the common law rule in *Foss v. Harbottle*. Both decisions below are grounded in the civil law and apply the requirements of civil liability set out in *Houle*. As discussed below, the appellants’ failure to meet these requirements fully justified the dismissal of Fiducie’s claim.

C. *Application*

[33] The appellants were bound to allege facts that correspond to the elements set out in *Houle* to establish Fiducie's sufficient interest in seeking damages against the respondents. They had to demonstrate that, despite being an indirect shareholder of the Groupe Melior corporations, Fiducie had an *independent* cause of action in civil liability against the respondents. This required the appellants to show that (1) the respondents breached a distinct legal obligation owed to Fiducie, and (2) this breach caused Fiducie to suffer a direct injury distinct from that suffered by the Groupe Melior corporations. In my view, the appellants failed on both counts.

(1) Breach of a Distinct Legal Obligation

[34] The appellants had to allege facts to support a finding that the respondents breached a distinct legal obligation owed to Fiducie. To this effect, they argued that the respondent lawyers and accountants maintained contractual relationships with both Fiducie and the corporations of Groupe Melior: A.F., at para. 8. They also alleged that the respondents committed both contractual and extra-contractual faults against Fiducie. These faults related largely to the flawed tax structure the respondents established for Groupe Melior: Motion to Institute Proceedings, at paras. 278-92.

[35] The alleged facts that relate to this first requirement of *Houle* refer primarily to legal obligations owed to the Groupe Melior corporations and not to Fiducie. They do not suffice to give Fiducie an independent right of action against the respondents as they do not disclose the breach of an independent legal obligation

owed to Fiducie. I add that, even where the Motion to Institute Proceedings alleges distinct legal obligations owed by the respondents to the Fiducie, it fails to allege how these obligations relate to the injury at issue in this appeal.

[36] Take, for instance, the general allegations put forward by the appellants in the opening paragraphs of their statement of facts:

[TRANSLATION]

As will be shown below, the defendants, who are all lawyers, accountants and/or auditors, behaved in a clearly unreasonable manner in the performance of mandates relating to management of the affairs of the Groupe Melior (as defined below) and in their dealings with Mr. Maynard, both in his personal capacity and in his capacity as trustee of the Fiducie, and repeatedly acted with gross negligence and breached their duties to be competent and to provide advice in their role as advisors of the Groupe Melior, Mr. Maynard and the Fiducie, thereby causing significant injury to the Fiducie and Mr. Maynard;

Since the defendants were acting as professionals on behalf of the Groupe Melior, the Fiducie and Mr. Maynard, they were, at all times relevant to these proceedings, fully aware, or they could not reasonably have been unaware, that their actions would cause injury to the Fiducie and Mr. Maynard; [Emphasis added.]

(Motion to Institute Proceedings, at paras. 3-4)

[37] It is clear from the foregoing that the appellants confuse the obligations owed by the respondents to the Groupe Melior corporations with those allegedly owed to Fiducie and to Mr. Maynard. Despite the promise of further specificity, this confusion of obligations continues throughout the statement of facts: see e.g., at paras. 35, 46 and 256. The problem is that an obligation owed by the respondents to

Groupe Melior does not necessarily give rise to an independent obligation owed to Fiducie.

[38] For example, while the appellants claim that the respondents acted negligently in establishing the tax structure of Groupe Melior, they allege only facts that relate to obligations owed to Groupe Melior itself: see e.g. Motion to Institute Proceedings, at paras. 181, 198 and 273. In other words, they fail to show how the respondents owed an independent obligation to inform and advise Fiducie itself on the tax structure. Similarly, the fact that information about this tax structure might have been communicated to Mr. Maynard in his capacity as director of several corporations of Groupe Melior does not mean that the respondents had a distinct obligation to inform Fiducie in its capacity as the ultimate shareholder of the corporations.

[39] It is, of course, true that injury to the corporations in Groupe Melior may have consequences for those holding their shares. Fiducie is the sole shareholder of 9143-1304 Québec inc.; this corporation controlled in whole or in part, the corporations of Groupe Melior. For this reason, any breach of an obligation owed to Groupe Melior would tend to have an indirect impact on the interests of both 9143-1304 Québec inc. and Fiducie. Mr. Maynard, acting as a trustee and the primary beneficiary of Fiducie, could also be affected by faults committed against Groupe Melior and the resulting injuries. But having chosen to structure his business by means of various incorporations, he cannot now seek to avoid the consequences of

those choices. As Justice Wilson put it in *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, “[h]aving chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to ‘blow hot and cold’ at the same time”: p. 11.

[40] Fiducie is, of course, content to avoid the debts owed by the corporations of Groupe Melior. This limited liability, however, comes at a cost: as shareholder, Fiducie has no right of action in relation to faults committed by the respondents against Groupe Melior. Given the exceptional nature of Fiducie’s claim, it was incumbent upon the appellants to allege sufficient facts to show how the respondents breached a legal obligation owed to Fiducie distinct from those owed to the Groupe Melior. Their failure to do so is fatal to Fiducie’s claim.

(2) Distinct Injury

[41] The appellants were also obliged to allege facts showing a direct injury suffered by Fiducie as distinct from that suffered by Groupe Melior. They describe the injury suffered by Fiducie as [TRANSLATION] “the total loss of value of the trust patrimony”: Motion to Institute Proceedings, at para. 293. Fiducie claims \$55,000,000 worth of damages for this injury, calculated primarily to reflect the net value of the seniors’ residences owned and operated by Groupe Melior by the end of summer 2008: *ibid.*, at para. 300. The problem, however, is that these residences belonged to the Groupe Melior corporations and not to Fiducie. As the ultimate shareholder, Fiducie inevitably suffered from the bankruptcy of the Groupe Melior

corporations. As alleged in the Motion to Institute Proceedings, however, the injury caused by the respondents — the bankruptcy and ensuing loss of the seniors' residence — was suffered by the corporations of Groupe Melior. It was not directly suffered by Fiducie.

[42] This conclusion is reinforced by the evidence adduced by the appellants before the Superior Court. For instance, the expert report used to calculate Fiducie's damages reveals that the loss of value from the trust patrimony that was suffered by Fiducie corresponds to the net value of the seniors' residences once owned by Groupe Melior: paras. 69-72, citing exhibit P-8. This confirms that the injury alleged by Fiducie is indistinguishable from the losses suffered by Groupe Melior.

[43] This Court has often affirmed that the statement of claim (called and originating application in Quebec (in the new *C.P.C.*)) defines the issues and informs the opposing parties of the case they have to meet: *Haaretz.com v. Goldhar*, 2018 SCC 28, at para. 21; see also *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 41. For this reason, neither the parties nor the courts may redefine a cause of action on appeal nor read into a statement of claim what is not there. As the alleged injury in this case was suffered by the Groupe Melior corporations, the facts pleaded by the appellants point only to an indirect injury suffered by Fiducie.

[44] Indirect injuries are not compensable under art. 1607 *C.C.Q.* As Beaudoin, Deslauriers and Moore have stated:

[TRANSLATION] The courts will not recognize loss the immediate source of which is not the fault itself but some other injury already caused by the fault. In other words, damage resulting from damage, repercussive damage, “second degree” damage, is indirect.

(J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile, Principes généraux* (8th ed. 2014), vol. 1, at No. 1-684)

[45] Several decisions in Quebec have affirmed this principle and held that a direct injury suffered by a corporation amounts to an indirect injury suffered by the shareholder: *Houle*, at p. 186; *Biosyntech*, at para. 23; *Silverman*, at p. 539; *Michaud v. Groupe Vidéotron Ltée*, [2003] R.J.Q. 3087 (C.A.), at para. 66; *St-Paul Fire & Marine Insurance Co. v. Parson & Misiruk Construction Ltd.*, [1996] R.J.Q. 2925 (Que. Sup. Ct.) at pp. 2971-72; *Pellin v. Bedco, division de Gérodon Inc.*, 2002 CanLII 20301 (Que. Sup. Ct.), at para. 44. This case is no exception.

[46] I acknowledge that the characterization of an injury, as direct or indirect, requires an assessment of causation and that questions of causation are typically left to the trial judge. Some decisions in Quebec have declined to dismiss claims on this basis on a preliminary motion: *3952851 Canada inc. v. Groupe Montoni (1995) division construction inc.*, 2017 QCCA 620, at para. 47 (CanLII); *Bruneau v. Gespro technologies Inc.*, 2001 CanLII 20199 (Que. Sup. Ct.), at paras. 11-13. There is an important difference, however, between these cases and the case at hand. In the former, the courts considered that the alleged facts were sufficient to establish the legal basis of the claims or the required interest of the claimants: *Montoni*, at para. 56; *Gespro*, at paras. 20-21. Such is not the case here. While courts must be careful in

exercising their power to dismiss claims for lack of sufficient interest, courts have an obligation to end proceedings when that interest is manifestly absent: *Montréal (Ville de) v. Montréal-Ouest (Ville de)*, 2009 QCCA 2172, [2009] R.J.Q. 2729, at para. 31.

[47] Furthermore, if we accept that the characterization of injury is so closely related to causation that it must in all cases be decided at a trial on the merits, then preliminary motions under art. 165(3) would invariably fail in the context of civil liability. This is because one of the essential elements of the claim — injury — could never be challenged prior to a trial on the merits. At the preliminary stage, Quebec courts would effectively be stripped of any means to weed out unfounded claims in civil liability for lack of sufficient interest under art. 165(3).

[48] The potential for wasted judicial resources here is considerable. As this Court set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, “undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes”: para. 24. The fair and just resolution of disputes requires an efficient allocation of judicial resources. The scarcity of judicial resources requires that courts be able to dismiss claims that are manifestly unfounded at a preliminary stage.

[49] To borrow from Chief Justice McLachlin in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, “[t]he power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless

claims and ensuring that those that have some chance of success go on to trial”:
para. 19. The same is true for the power to dismiss claims for lack of sufficient
interest under the *C.C.P.*

[50] Having failed to show a direct injury suffered by Fiducie from the one
suffered by the Groupe Melior corporations, Fiducie falls short of the requirement
sets out in *Houle*. Consequently, it cannot establish a sufficient interest in seeking
damages against the respondents.

VI. Conclusion

[51] The principles of procedural and corporate law in Quebec bar
shareholders from exercising rights of action that belong to the corporations in which
they hold shares. Shareholders may institute proceedings, however, if they can
demonstrate (1) a breach of a distinct obligation, and (2) a direct injury that is distinct
from that suffered by the corporation in question. These requirements reflect the
essential principles of civil liability under the *C.C.Q.* and provide shareholders having
a direct and personal interest with a means to seek damages against third-party
defendants.

[52] In this case, the appellants’ Motion to Institute Proceedings does not
disclose the breach of a distinct legal obligation, nor does it disclose a distinct injury
from that suffered by the Groupe Melior corporations. They have consequently not

demonstrated a direct and personal interest that would allow Fiducie to claim damages from the respondents.

[53] I add this. If shareholders wish to ensure that a corporation exercises its rights, they may do so by means of a derivative action in the corporation's name: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 239; *Business Corporations Act*, CQLR, c. S-31.1, s. 445. These rules change upon bankruptcy as all rights of action belonging to the corporation pass to the trustee. If the trustee declines to pursue an action on behalf of the corporation, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, provides that a creditor may obtain from the court an authorization to institute proceedings based on a right of action belonging to the corporation: s. 38(1). As a result, other creditors are then afforded the opportunity to participate in the proceedings. Shareholders have no such right. Any surplus recovered by the creditors belongs to the estate of the corporation for the benefit of all creditors and, *if anything remains*, for the benefit of its shareholders. To allow shareholders to gain an independent right of action prior to this distribution for injuries suffered by the bankrupt corporation would be to upend the usual priorities of the *Bankruptcy and Insolvency Act*.

[54] In this case, the trustee in bankruptcy of Groupe Melior could have instituted proceedings against the respondents but did not. The creditors of Groupe Melior, with the bankruptcy court authorization, could also have instituted proceedings against the respondents but did not either. Their failure to institute

proceedings does not provide Fiducie with an independent cause of action against the respondents. As Fiducie lacks the sufficient interest required by art. 55 of the former *C.C.P.*, I would dismiss the appeal with costs to Legault Joly Thiffault, s.e.n.c.r.l.; LJT Fiscalité Inc.; LJT Corporatif Inc.; LJT Conseil Inc.; LJT Litige Inc.; LJT Immobilier Inc.; and Lehoux Boivin Comptables Agréés, s.e.n.c.; and uphold the dismissal of their claim under art. 165(3) of the former *C.C.P.*

English version of the reasons delivered by

CÔTÉ J. —

I. Introduction

[55] There is nothing trivial about dismissing an action before the plaintiff has even had an opportunity to be heard on the merits. As this Court noted in *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, [2014] 2 S.C.R. 477, at para. 1, “[a]lthough the proper administration of justice requires that the courts’ resources not be expended on actions that are bound to fail, the cardinal principle of access to justice requires that the power be used sparingly, where it is clear that an action has no reasonable chance of success”. Caution must be exercised, particularly where the basis for the exception to dismiss is that the plaintiff has no

interest. Whether an interest exists is often dependent on the facts, and can rarely be assessed fully before trial.

[56] In the instant case, the courts below found that Fiducie Maynard 2004¹ (“Fiducie”) clearly did not have a sufficient interest or the necessary capacity to bring an action against the respondents. They accordingly declared that the re-re-amended and particularized motion to institute proceedings (“MIP”) was inadmissible and dismissed it at the preliminary stage. My colleague Rowe J. agrees with them and would therefore dismiss the appeal.

[57] Mayrand J. of the Superior Court was of the view that the MIP did not identify any fault allegedly committed against Fiducie that was distinct from the fault allegedly committed against the corporations making up Groupe Melior, of which Fiducie was an indirect shareholder (2015 QCCS 3482, at paras. 58 and 63). She also expressed the view that the MIP did not refer to any damage suffered by Fiducie that was distinct from the damage suffered by those corporations (para. 66). As a result, she found that Fiducie clearly did not have the necessary interest to bring this action, given that the corporations in question were the [TRANSLATION] “holders of the rights being claimed” (para. 79).

[58] The Court of Appeal affirmed that decision and dismissed Fiducie’s appeal. In its opinion, the MIP did not allege any direct damage that was distinct from

¹ In these proceedings, Fiducie Maynard 2004 is represented by its trustees, Yves Brunette and Jean M. Maynard. For the sake of readability, I will simply use the word “Fiducie” to refer to the appellants.

and independent of the damage caused to the corporations (2017 QCCA 391, at para. 30). In light of that finding, the Court of Appeal saw no need to determine whether the MIP alleged a breach of an obligation owed to Fiducie (para. 35).

[59] In my view, the courts below made an error in respect of which this Court must intervene. According to the uncontradicted allegations in the MIP, there were separate contracts of mandate between, on the one hand, Fiducie and the respondent lawyers, accountants and tax experts and, on the other hand, the Groupe Melior corporations and the respondents. It is also alleged in the MIP that the respondents breached their obligations under their mandates with Fiducie, thereby causing direct personal damage to it (see art. 1458 of the *Civil Code of Québec* (“C.C.Q.”)). At the preliminary stage, these allegations are sufficient to establish that Fiducie has the necessary interest to bring an action. Questions of fact and questions of mixed fact and law, such as the directness of the damage and the fault, must be left to the trial judge and decided after the relevant evidence has been considered. Without expressing an opinion on Fiducie’s chances of proving its interest at trial, I believe that it is premature to dismiss the action. I would therefore allow the appeal.

II. Dismissal on the Basis That the Plaintiff Clearly Has No Interest

[60] The sufficient interest required by art. 55 of the *Code of Civil Procedure*, CQLR, c. C-25 (“former C.C.P.”) — now art. 85 of the *Code of Civil Procedure*, CQLR, c. C-25.01 (“new C.C.P.”) — is the monetary or moral benefit the plaintiff will derive if the action is well-founded (*Jeunes Canadiens pour une civilisation*

chrétienne v. Fondation du théâtre du Nouveau-Monde, [1979] C.A. 491, at pp. 493-94; *Consoltex inc. v. 155891 Canada inc.*, 2006 QCCA 1347, at para. 28 (CanLII); *Kingsway, compagnie d'assurances générales v. Bombardier Produits récréatifs inc.*, 2010 QCCA 1518, [2010] R.J.Q. 1894, at para. 21). This interest must be legal in nature, such that it depends on the existence of a substantive right that is enforceable by the courts (*Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at paras. 37-38). It must also be direct and personal in the sense that a right specific to the plaintiff must have been infringed (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at paras. 44 and 47).

[61] Having an interest is, first of all, a substantive condition. If the evidence at trial shows that the plaintiff does not have a sufficient interest, the action will be dismissed by way of a final judgment (D. Ferland and B. Emery, *Précis de procédure civile du Québec* (5th ed. 2015), vol. 1, at para. 1-888).

[62] Having an interest is also an essential criterion for the admissibility of any action (*Jeunes Canadiens pour une civilisation chrétienne*, at p. 493; C. Belleau, *Collection de droit 2017-2018, Preuve et procédure*, vol. 2, at pp. 59-60). An action may be dismissed at the preliminary stage, but only if it is clear that the plaintiff has no interest. This rule is expressly set out in the *Code of Civil Procedure*:

165. The defendant may ask for the dismissal of the action if:

...

(3) The plaintiff has clearly no interest in the suit;
(former *C.C.P.*, art. 165)

168. A party may ask that an application or a defence be dismissed if

...

(3) one of the parties clearly has no interest.
(new *C.C.P.*, art. 168)

[63] Thus, the dismissal of an action before trial requires that it be clear that the plaintiff has no interest. The French word “*manifeste*” (“*manifestement*” is the equivalent of the word “clearly” in the French version of both art. 165(3) and art. 168(3)) is defined as follows in the *Dictionnaire de droit québécois et canadien*: [TRANSLATION] “Very apparent, discernible simply from seeing or reading a document, record or judgment” (H. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015), at p. 405). In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 5-6, the Court noted that “*manifeste*” (“palpable” in the English version of that case) means [TRANSLATION] “plainly seen” or “not open to dispute”.

[64] The reason the legislature has made a point of requiring that it be “clear” that the plaintiff has no interest — which, moreover, it has not expressly done in respect of any of the other exceptions to dismiss — is no doubt that the concept of interest is closely related to the substantive right itself, and in most cases that right

cannot be established without a full assessment of the facts and without reviewing the evidence.

[65] To establish an interest at the admissibility stage, the plaintiff must allege the necessary elements of the substantive right being claimed, but he or she is not required to prove these elements before trial. As a result, the interest must be inferred simply by reading the originating application (Ferland and Emery, at para. 1-1221; L. Chamberland, *Le grand collectif: Code de procédure civile — Commentaires et annotations* (3rd ed. 2018), at p. 588). This was confirmed in *Jeunes Canadiens pour une civilisation chrétienne*:

[TRANSLATION] The necessary interest, like the other subjective conditions, cannot be presumed; if not specifically raised, it must necessarily be inferred from the words of the pleading; a vague, general allegation of personal damage is not enough. [Emphasis added; p. 494.]

[66] To be sufficient to show that an interest exists at the admissibility stage, allegations must, at a minimum, be clear and precise (art. 99 of the new *C.C.P.*; art. 76 of the former *C.C.P.*). However, in the specific case of causation, an “allusion” is generally sufficient (see *3952851 Canada inc. v. Groupe Montoni (1995) division construction inc.*, 2017 QCCA 620, at para. 49 (CanLII), citing *Acadia Subaru v. Michaud*, 2011 QCCA 1037, [2011] R.J.Q. 1185, at para. 55).

[67] In my opinion, Professor Charles Belleau provides a good description of the plaintiff’s burden at this preliminary stage:

[TRANSLATION] All in all, the question of admissibility involves inquiring into whether, independently of the substantive issues, the right of action a litigant claims to have meets fundamental criteria that give the court the authority to consider it. It should be clear from the application itself that the person making it has an interest in the suit and the necessary capacity to bring an action and is not incapable, and that his or her right of action has not been extinguished by the expiry of a prescription period. The first three conditions are set out in the Code of Civil Procedure, while the last can be inferred from substantive law provisions, including those of the Civil Code. They are normally verified simply by reading the originating application. If the opposing party notes that one of them is not met, he or she can raise a preliminary exception called an exception to dismiss, thereby trying to have the application dismissed before it can be heard on the merits (art. 168).

...

... [W]here a creditor sues a debtor for payment of what he or she is owed, it is clear simply from reading the allegations in the originating application to the effect that the claim exists and is exigible, as well as the conclusion in the application asking the court to order the defendant to pay the creditor the amount claimed in that regard, that the creditor has the interest required to sue because his or her patrimony would otherwise suffer a loss of income. If that is the case, the defendant will not be able to raise an exception to dismiss in respect of the application. But as for the issue of whether the claim actually exists and is exigible, it goes to the “merits” of the application. A defendant wishing to argue this point will then have to proceed with his or her defence (art. 170), and the case might continue to trial and to a judgment on the merits by the court. [Emphasis added; italics in original deleted.]

(Belleau, at p. 59)

[68] That being said, it is true that the alleged facts are not automatically assumed to be true in the context of an exception to dismiss based on the plaintiff’s clearly having no interest. The court can therefore allow the parties to adduce any evidence that is considered necessary (*Société d’habitation du Québec v. Leduc*, 2008 QCCA 2065, at para. 16 (CanLII)) so as, among other things, to give the defendant an opportunity to contradict the allegations.

[69] Where the allegations are not contradicted, however, the court must assume them to be true. Otherwise, the hearing on the exception to dismiss could well become a trial before a trial, which is certainly contrary to the principle of proportionality and to the interests of the proper administration of justice. The principles laid down by this Court in the context of an application raising the declinatory exception therefore apply with equal force to an exception to dismiss based on the plaintiff's clearly having no interest:

The declinatory motion allows the defendants to challenge the facts alleged by the plaintiff. Indeed, in the case at bar, the appellants adduced evidence to demonstrate that the incentive payments were made to the respondent's head office in Toronto and not to the respondent's establishment in Ste-Anne-de-Bellevue. Nevertheless, the fact remains that the role of the motions judge is to refrain from evaluating the evidence of parties unless the facts are specifically contested by the parties. In my opinion, reading in limitations with respect to the amount and nature of the damage that must be suffered in the jurisdiction before the court can assert its competence may improperly require the motions judge to prematurely decide the merits of the case. [Emphasis added.]

(Spar Aerospace Ltd. v. American Mobile Satellite Corp., 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 32)

[70] To adopt any other approach would be to disregard the need to exercise caution in ruling on an exception to dismiss (*Confédération des syndicats nationaux*, at paras. 1 and 17-19; *Leduc*, at paras. 14-18; *Ferland and Emery*, at para. 1-1221). Given the serious consequences of dismissing an action prematurely, the plaintiff must be given an opportunity to be heard on the merits if there is any doubt (*St-Eustache (Ville de) v. Régie intermunicipale Argenteuil Deux-Montagnes*, 2011 QCCA 227, at paras. 24-25 and 31 (CanLII); *Bohémier v. Barreau du Québec*, 2012

QCCA 308, at para. 17 (CanLII); *Entrepôt International Québec, s.e.c. v. Protection incendie de la Capitale inc.*, 2014 QCCA 617, at para. 2 (CanLII)). This is especially true where his or her interest is in issue, given that the legislature has specified that a court must not dismiss an action unless it is *clear* that the plaintiff has no interest.

[71] In the instant case, the respondents adduced no evidence that contradicted the allegations set out in the MIP. They merely [TRANSLATION] “referred to excerpts from Maynard’s examination on discovery that confirm certain statements alleged in the MIP, and they filed a summary table of exhibits that had already been filed by Fiducie” (Sup. Ct., at para. 34). In circumstances such as these, there is no need to look beyond the allegations in the MIP (see *Racine v. Langelier*, 2013 QCCS 5657, at paras. 17-19 (CanLII)). As I will explain in the next section, those allegations were sufficient — at the admissibility stage — to establish Fiducie’s interest. The exception to dismiss therefore had to be dismissed. In my opinion, any other conclusion would be imprudent at this stage of the proceedings.

[72] Before going any further, I will simply add that the applicable standard of review in the case at bar is correctness. Given that the court hearing a preliminary exception does not assess the evidence, there is no justification for showing deference on an appeal from its decision (*Montoni*, at para. 32; *Entrepôt International Québec*, at para. 1).

III. Fiducie’s Interest at the Preliminary Stage

[73] At the admissibility stage, Fiducie bears the burden of alleging the necessary elements to establish that it has the interest required to bring a civil liability action against the respondents. Thus, the MIP had to point to an extracontractual fault or breach of contract, compensable damage, and a causal connection between the two. In my opinion, all of these elements are present.

[74] I note that establishing an interest at the preliminary stage does not require the plaintiff to prove that his or her suit is founded *in law*. If, although the alleged facts are assumed to be true, the defendant disputes the substantive law on which the action is based, the defendant must raise the exception to dismiss that applies specifically to suits that are unfounded in law (art. 168 para. 1(2) of the new *C.C.P.*; art. 165(4) of the former *C.C.P.*). In the case at bar, it seems to me that these two exceptions to dismiss have to a large extent been confused with one another. Be that as it may, I will also discuss the principles of civil liability and corporate law that apply to the action, because that is how the case has been dealt with in all the courts.

A. *In Some Circumstances, Shareholders Have Their Own Right of Action for a Loss in the Value of Their Shares*

[75] Fiducie alleges that the respondents — professionals whose services it retained — breached a number of contractual obligations they owed to it, thereby directly causing the destruction of its trust patrimony, that is, the value of the shares it held in 9143-1304 Québec inc. and, indirectly, in the various corporations of Groupe Melior (see, for example: MIP, at paras. 26, 34-35, 45-46, 102, 256 and 300).

[76] The nature of this claim leads my colleague — like the courts below before him — to review the principles of corporate law that apply in Quebec (paras. 22 et seq.). On this subject, I agree with the substance of his comments on the distinct legal personalities of corporations and their shareholders. Shareholders have no right of action for a fault committed against a corporation in which they hold shares (paras. 23 and 27, where my colleague refers, *inter alia*, to *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, at pp. 177-80). That right belongs solely to the corporation, and it is the corporation that must exercise it (paras. 25-26). I agree that the result reached in this regard in Quebec civil law is much the same as the one reached in the common law elsewhere in the country (paras. 24 and 28).

[77] As a shareholder, Fiducie therefore has no right of action for breach of a contractual obligation owed to the Groupe Melior corporations that caused damage to the latter. Indeed, Fiducie does not dispute this conclusion. Rather, it argues that it has a right of action of its own against the respondents that is based on a distinct contractual obligation owed to it and on direct damage specific to it, as was the case in *Houle*.

[78] What *Houle* shows is that, in certain exceptional circumstances, shareholders may have a right of action distinct from that of the corporation for a loss in the value of their shares, and may therefore have a sufficient interest to bring an action in their own names. For this purpose, the shareholders must allege (i) that there was a breach of a distinct obligation owed to them and (ii) that the breach caused

direct personal damage to them (*Houle*, at pp. 180-87). As my colleague explains, this is not strictly speaking an “exception” to the corporate veil, but instead represents a simple application of the general principles of civil liability (para. 30).

[79] However, I respectfully believe that my colleague departs from those very principles by emphasizing the “distinct” nature of the damage and by reading *Houle* too narrowly (paras. 29-31, 33 and 41). His reasons, like those of the courts below, suggest that the shareholder’s damage must be *unrelated* to that of the corporation. But that is not the case. In *Houle*, the plaintiffs’ damage — a drop in the value of their shares — resulted from the liquidation of the corporation’s assets. It was not entirely “distinct” damage. What is more, L’Heureux-Dubé J. at no time used the word “distinct” to describe the damage in question, as she did to describe the obligation owed to the shareholder.

[80] In my opinion, *Houle* requires no more than does the *Civil Code of Québec*, namely that the damage be direct and personal (arts. 1607 and 1611 *C.C.Q.*):

In order for the prejudice to be compensated, it must be direct and certain (art. 1075 [of the *Civil Code of Lower Canada*]). The above facts were dealt with by the trial judge and the Court of Appeal. Both concluded that the respondents suffered a loss of \$250 000, representing the difference between the value of the shares before and after the acts of the appellant bank. This value is no longer contested and constitutes actual damage. Thus, the damage is certain.

It may be questioned whether the damage is direct. The argument would be that the company suffered the damage, and only indirectly would the shareholders be prejudiced, on account of the value of their shares being affected.

In most circumstances, this argument would prevail. Even if fault can be found, the damage is done to the company, and it is for the company to claim compensation for the damage. However, in this case, there was more than just damage to the company, since, to the knowledge of the bank, the respondents were in the process of negotiating the sale of their shares. The respondents had a direct, personal, financial interest at stake and the bank knew this. Furthermore, the respondents sold their shares, very soon after the liquidation of the company's assets, to the same company with whom they were previously negotiating. In these circumstances, it was the potential sale value of their shares that was damaged, a value that the respondents were at the point of enjoying personally. The acts of the bank resulted in the respondents' losing something that was inches away from their grasp.

...

... On the facts of this case, the harm flowing from the imminent sale of the respondents' shares in the company resulted in direct damage to the shareholders, besides or beyond and independently of any damage the company itself may have incurred as a result of its contractual relationship with the bank. [Emphasis added.]

(*Houle*, at pp. 185-86)

[81] This passage shows that *Houle* did not introduce a new criterion in addition to the existing ones under the *Civil Code of Québec*. L'Heureux-Dubé J. did state that, on the facts of the case, there was "direct damage to the shareholders, besides or beyond and independently" of the damage sustained by the corporation. But the fact remains that the damage in question corresponded to the drop in the value of the shares that had resulted from the quick liquidation of the corporation's assets. In other words, the damage for which a claim was being made coincided with the corporation's losses. If that damage became "independent" or "distinct", it was simply because of the particular circumstances of the case. The bank's wrongful conduct in relation to the shareholders had *directly* affected the value of their shares. The concept of "independent" damage was used only to illustrate the fact that, in

exceptional cases, damage sustained by a shareholder may be direct and personal. Therefore, contrary to what is suggested in my colleague's reasons and those of the courts below, this concept is not in itself a condition to be met. Moreover, I note that my colleague does not explain the precise nature of this supposed criterion or its relationship to the general principles of civil liability. Nor does he explain what made the damage of the shareholders in *Houle* "independent" or "distinct", if not the extracontractual fault committed against them by the bank.

[82] This emphasis on the "distinctness" of the damage is confusing and distorts the analysis. Once there is a drop in the value of shares, as there was in *Houle*, a shareholder's damage cannot be completely dissociated from that of the corporation. What must instead be determined is whether there are exceptional circumstances that make the shareholder's damage *direct* damage, as is required by art. 1607 C.C.Q. In *Bruneau v. Gespro technologies inc.*, 2001 CanLII 20199 (Que. Sup. Ct.), a case in which shareholders were suing third parties who had appropriated software owned by a corporation, Bouchard J. (as he then was) provided a good summary of the approach to be taken as a result of *Houle*:

[TRANSLATION] It follows from this decision of the Supreme Court that a loss in the value of a company's shares can be regarded as damage specific to a shareholder if the shareholder can show that, in the circumstances, the third party who committed a fault had a distinct legal obligation to act reasonably toward him or her.

In the instant case, the Court cannot rule out the possibility that the facts alleged in the plaintiffs' declarations, though different from the facts of *Houle*, will lead the judge who hears the case on its merits to consider whether the defendants, because of their specific relationship with the

plaintiffs and of the alleged business transactions, were required, independently of their contractual obligations to 9008 and SIT, to act reasonably in their dealings with the plaintiffs. [paras. 19-20]

This reasoning has been followed many times, including by the Court of Appeal in a decision subsequent to its judgment in the case at bar (*Montoni*, at paras. 47-48; see also *Agri-capital Drummond inc. v. Mallette, s.e.n.c.r.l.*, 2009 QCCA 1589, [2009] R.R.A. 935, at paras. 53-57; 9227-1899 *Québec inc. v. Gosselin*, 2013 QCCS 5036, at paras. 23-28 (CanLII); *Conporec inc. v. Sorel-Tracy (Ville de)*, 2013 QCCS 2789, at paras. 31-32 (CanLII); *Industries Portes Mackie inc. v. Garaga inc.*, 2007 QCCS 3304, at para. 31 (CanLII); *Desrochers v. EDC-Exportation et développement Canada*, 2007 QCCS 3032, at paras. 25-26 (CanLII); *Besner v. Friedman & Friedman*, 2004 CanLII 14237 (Que. Sup. Ct.), at paras. 87-97; see also, in the academic literature, the comments on *Houle* in P. Martel, *La société par actions au Québec* (2011), vol. 1, at paras. 1-257 to 1-260).

[83] In my view, the Court of Appeal therefore erred in the instant case by seeking to identify damage that was entirely [TRANSLATION] “distinct and independent” (paras. 25-31), whereas in *Houle*, this Court had insisted only on damage that was direct and personal — as required by the *Civil Code of Lower Canada* and, now, the *Civil Code of Québec* — and had explicitly recognized that a loss in the value of shares may, in exceptional circumstances, constitute such damage. I cannot, therefore, agree with the Court of Appeal or with my colleague on this point.

[84] The Court of Appeal also erred in ruling that there was no direct damage without taking all the circumstances into account and without even considering the distinct obligations owed to Fiducie by the respondents (para. 35). Viewed in that light, the loss of the trust patrimony could only have seemed indirect. Determining whether damage is direct or indirect comes down to determining whether it is a direct consequence of the alleged default (art. 1607 *C.C.Q.*). The damage issue therefore cannot be considered in isolation, without reference to fault or breach of contract. In *Houle*, for example, it was presumably only because of the bank's wrongful conduct toward the shareholders that the loss in the value of their shares could be characterized as damage that was "direct", and therefore "independent". In this sense, Fiducie is not wrong to say that the Court of Appeal has departed from the principles from *Houle*.

B. *Questions of Fact and Questions of Mixed Fact and Law Must Be Decided After the Relevant Evidence Is Considered*

[85] The Court of Appeal also erred in making findings in relation to the "indirect" nature of the damage at the preliminary stage. This question of fact must instead be left to the trial judge, since it requires that all the circumstances of the case be analyzed in light of the evidence. Unlike my colleague, I am of the view that there is no justification for making an exception to this rule and that this Court should therefore intervene to dismiss the preliminary exception.

[86] The question whether damage is direct cannot be considered separately from the causal connection between the fault and the damage (J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile, Principes généraux* (8th ed. 2014), vol. 1, at No. 1-333). Because causation, “without a doubt, is a question of fact” (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36 and 92; *Montréal (Ville) v. Lonardi*, 2018 SCC 29, at para. 41), the same holds true for the directness of the damage (*Bruneau*, at paras. 11-13).

[87] There is no ready-made formula for determining whether damage is direct. No damage — or victim — is automatically excluded. The commentators agree unanimously that this determination is essentially based on an assessment of the facts:

[TRANSLATION] The courts must therefore determine in each specific case, independently of the identity of the person making the claim, whether the *damage* being claimed is a direct consequence of the fault, and are not to try to decide whether the *plaintiff* is in fact the *immediate victim*.

(Baudouin, Deslauriers and Moore, at No. 1-337)

[TRANSLATION] The determination of the line between direct damage and indirect damage, which is based largely on the circumstances of each case and is made on a balance of probabilities, is not an exact science and does not really lend itself to theorizing.

(D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 2963; see also V. Karim, *Les obligations* (4th ed. 2015), vol. 2, at para. 1996)

[88] But it is well established that a judge must refrain from deciding a question of fact, or even a question of mixed fact and law, at the preliminary stage unless, in the case of an exception to dismiss based on the plaintiff's clearly having no interest, sufficient evidence is adduced at that stage. In the instant case, the Court of Appeal itself recognized that such questions must in principle be decided by the trial judge, but it reserved the right to depart from the rule:

[TRANSLATION] While it is fair to say that it is often preferable to let the trial judge decide such questions, the Court is of the opinion that it is not appropriate to do so where, as in this case, the conclusion is clear. Allowing the action to continue would serve no useful purpose. [para. 34]

[89] It is not simply a matter of "appropriateness", however. Indeed, the Court of Appeal reaffirmed this rule in *Montoni*, a decision rendered barely a month after the judgment being appealed from in the case at bar. In *Montoni*, the Court of Appeal stressed that it is important for a judge hearing an exception to dismiss not to rule on questions of causation:

[TRANSLATION] That being said, the courts recognize that in extracontractual liability cases, it is for the trial judge to determine whether damage is direct or indirect. In *Bruneau v. Gespro technologies inc.*, Justice Jean Bouchard of the Superior Court (as he then was) stated the following in dismissing the first exception to dismiss based on the claimed damage being indirect:

[12] The basis for the proceedings brought by the plaintiffs is extracontractual. To succeed in their actions, they will have to prove fault, damage and a causal connection between the two. Because the Court must assume the facts to be true when hearing a motion under article 165(4), it would certainly be usurping the role of the judge who hears the case on its merits

if it were to determine at this stage whether the damage alleged by the plaintiffs is indirect.

...

In *Acadia Subaru v. Michaud*, this Court also noted that the determination of whether there is a causal connection between the damage and the alleged faults must be made at trial. In that case, the Court held that an allusion to causation in the motion (coupled with allegations of damage and fault) was sufficient for it to find that the suit was not unfounded in law. [Emphasis added; emphasis in original deleted; paras. 47-49.]

[90] The Court of Appeal reconfirmed these principles in *Fanous v. Gauthier*, 2018 QCCA 293:

[TRANSLATION] Questions of fact must be left to the trial judge, who must assess the evidence as a whole. Indeed, questions of fact and mixed questions cannot be decided at this stage of the case, given that they necessarily entail a factual inquiry. Where a question cannot be resolved on the face of the record, therefore, the motion to dismiss must be dismissed. Such is the case here.

...

In this case, many allegations of fact are sufficient to allow the appellant's action in damages to go to trial.

...

Care must be taken to avoid ending litigation at an early stage without considering the case on its merits. Such a motion can be granted only if the legal situation is plain and unambiguous, which it is not here. [Emphasis added; paras. 16, 19 and 21 (CanLII).]

[91] Regarding fault, a question of mixed fact and law, the rule remains the same as for the directness of the damage. For example, in *Weinberg v. Ernst & Young LLP*, 2003 CanLII 33911 (Que. Sup. Ct.), certain shareholders of Cinar Corporation

brought an action against Ernst & Young, which had acted, *inter alia*, as Cinar's auditor, alleging that it had breached not only its obligations to the corporation, but also distinct contractual obligations it owed the shareholders themselves. As in this appeal, the plaintiffs were claiming damages for a loss in the value of their shares, an amount of more than \$170 million. In *Weinberg*, the Superior Court found that an exception to dismiss on the grounds that the plaintiffs clearly had no interest in the suit and that the suit was unfounded in law could not be granted, because issues relating to fault had to be decided on the merits:

[TRANSLATION] As for the other conclusions based on allegations that faults were committed by Ernst & Young, it is true that, in principle, these faults can be alleged only by Cinar and its subsidiaries given that Ernst & Young is being sued in its capacity as auditor — unless a derivative action is brought (which is not the case here) — but every principle has exceptions, which it is not open to this Court to decide in the context of a preliminary exception.

In addition, the alleged faults also involve breaches by or advice given by Ernst & Young in a capacity other than that of auditor of the books of Cinar and its subsidiaries. [Emphasis added.]

(*Weinberg*, at paras. 8-9; motion to dismiss appeal granted in *Weinberg v. Ernst & Young LLP*, [2003] Q.J. No. 14375 (QL) (C.A.))

[92] There is no justification here for us to depart from these well-established principles, which the Court of Appeal has reiterated on two occasions since its judgment in the instant case. Where sufficient uncontradicted allegations are made with respect to the necessary elements of the substantive right being claimed, only an individualized analysis based on the relevant evidence can establish whether the damage in question is a direct consequence of the alleged fault. A loss in the value of

a corporation's shares may be regarded as direct damage specific to a shareholder if the shareholder can show that, in the circumstances, the defendant breached a distinct obligation owed to him or her — as was the case in *Houle*.

[93] Contrary to what my colleague argues (para. 47), leaving it to the trial judge to determine whether the damage is direct is not tantamount to doing away, in the civil liability context, with the exception to dismiss based on the plaintiff's clearly having no interest. An action can still be dismissed at the preliminary stage if there are insufficient allegations regarding fault, direct and personal damage and a causal connection. As well, it can be dismissed if the evidence adduced at this stage shows that the plaintiff clearly has no interest. It is true that the plaintiff's burden is generally not a very difficult one to meet, but this is precisely what the legislature contemplated by insisting that an action not be dismissed unless it is *clear* that the plaintiff has no interest.

C. *Fiducie Has Established the Interest Required at the Preliminary Stage*

[94] Although the question of fault is one of mixed fact and law and the directness of damage and causation are questions of fact, these elements must be supported by allegations of fact that are sufficient to show at the admissibility stage that an interest exists. In my view, this has been shown in this case. The allegations in the MIP are sufficient to support an argument that a breach of a distinct obligation owed to Fiducie caused it damage that was direct and personal.

[95] Fiducie alleges that the respondents acted for it as lawyers, accountants and tax experts, thereby establishing a distinct contractual relationship between the parties (MIP, at paras. 3-4). In particular, the uncontradicted allegations in the MIP indicate that Legault Joly Thiffault acted as Fiducie's principal law firm from 2004 to 2010 (paras. 28 and 34-35). Lehoux Boivin acted as Fiducie's principal accounting firm from the time Fiducie was constituted (paras. 44-47). Finally, lawyer Marcel Chaput represented Fiducie in the course of tax audits (paras. 37 and 41(f)). The mandates given to the respondents allegedly gave rise to general duties to provide Fiducie with information and advice (MIP, at paras. 278, 280 and 282).

[96] The uncontradicted allegations in the MIP also indicate that the respondents committed several breaches of the professional obligations they owed to Fiducie. They are alleged to have been fully aware that the tax structure they were putting in place would not be accepted by Revenu Québec and was unnecessarily risky for Fiducie (paras. 5 and 176). But they allegedly failed to inform Fiducie in a timely manner of the risks being incurred and the disputes with Revenu Québec, thereby preventing it from rectifying the situation and avoiding the destruction of its trust patrimony (paras. 181-85, 229-31 and 256). It is alleged that in so doing, the respondents breached the duties they owed to *Fiducie* itself to provide information and advice. Those breaches are alleged to have been the *direct* cause of Fiducie's damage, that is, the destruction of its trust patrimony (paras. 26, 229, 244 and 293-300).

[97] It should also be mentioned that the MIP refers to invoices for fees that had been sent directly to Mr. Maynard by the respondents Legault Joly Thiffault and Lehoux Boivin (paras. 312-14). The fees in question were allegedly claimed in 2011 for professional services that had been provided specifically to rectify the situation caused by these respondents' alleged breaches of the obligations they owed to Fiducie.

[98] Unlike my colleague (paras. 35-40), I am of the view that it would be possible for the trial judge to find on the basis of the alleged facts — after considering the evidence — that the respondents breached obligations that were *distinct* from the ones they owed to the Groupe Melior corporations. It is true that the MIP contains few specific allegations concerning the mandates given by Fiducie and their connection with the alleged breaches. However, the respondents' duties to provide information and advice were not strictly circumscribed by the object of those mandates (see *Côté v. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248, at para. 6). For example, the circumstances could in themselves have required the respondents to inform Fiducie directly and in a timely manner. It was clearly in Fiducie's interest to be aware of the situation, since it might have been in the best position to ensure that the necessary action was taken by the various entities of Groupe Melior and by their partners (see, *inter alia*, MIP, at paras. 181, 229 and 256). In my opinion, these are questions of mixed fact and law that cannot be decided at this stage of the proceedings without considering the relevant evidence.

[99] I want to be clear that, contrary to what the motion judge's reasons suggest (Sup. Ct., at paras. 58-63), Fiducie does not have to allege facts that are actually "independent" or "distinct" in order to establish a breach of a distinct obligation. It would be possible for the same facts — for example, in the instant case, the failure to inform Fiducie, Groupe Melior and the various entities in that group in a timely manner — to represent breaches of all the distinct obligations owed to them by the respondents (see *Montoni*, at para. 37).

[100] As for the assessment of Fiducie's damage, it must also be left to the trial judge. It is possible that the judge will conclude that the respondents' breaches were the *direct* cause of that damage in light, among other things, of their alleged failure, in breach of their obligations under the contracts of mandate with Fiducie, to inform Fiducie in a timely manner. As in *Houle*, the alleged damage — the destruction of the trust patrimony — corresponds to the drop in the value of the shares resulting from the loss of the underlying assets (MIP, at paras. 26 and 300). My colleague agrees with the Court of Appeal that Fiducie is instead essentially claiming the value of the seniors' residences owned by the Groupe Melior corporations (reasons of Rowe J., at paras. 41-42; C.A., at para. 27). However, although some might consider the wording of the MIP on this point to be clumsy, it is clear that Fiducie is simply using the value of the properties to estimate the value of its shares before Groupe Melior collapsed. This method of valuation is of course open to question, but this issue relates solely to the quantum of damages, and not to the very existence of damage. Moreover, to the extent that there is ambiguity in the allegations with regard to the amount of the

damages being claimed, it seems to me that the solution lies in an amendment of the MIP and in the expert evidence that will be presented at trial, not in the death sentence represented by outright dismissal of the action at the preliminary stage.

[101] I also note that the “personal” nature of the damage for the purposes of art. 1611 *C.C.Q.* is not in issue in this case. The loss in the value of the shares was incurred by Fiducie and no one else. Of course, to the extent that this damage and the losses of the corporations themselves overlap, there could be a risk of double recovery. But such a risk must be assessed on a case-by-case basis, in light of the circumstances and the evidence, at the time the quantum of damages is determined (*Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at paras. 114-15). This cannot be a sufficient basis for finding that a plaintiff clearly has no interest. In any event, the problem does not arise in the instant case, because no other claims have been made either by the corporations (or their trustee in bankruptcy) or by creditors.

[102] In summary, it can be seen from the MIP that Fiducie is alleging breaches of distinct obligations that caused it direct personal damage. These uncontradicted allegations must be assumed to be true and are sufficient to establish Fiducie’s interest at this preliminary stage. It will be for the trial judge to determine, after reviewing the evidence, whether the alleged breaches, damage and causal connection are sufficient to establish Fiducie’s interest on the merits.

[103] One final comment must be made. In my view, it is irrelevant that the corporations (or their trustee in bankruptcy) could themselves have sued the respondents but did not do so (reasons of Rowe J., at para. 53; C.A., at para. 28). This argument disregards the fact that Fiducie claims to have a right of action *distinct* from that of the corporations. It is true that Fiducie, as a shareholder, might have been able to avail itself of the procedures similar to the oblique action that are provided for in business corporations legislation and thus bring an action *in the name of the corporations*. But that does not negate the right of action it claims to have *in its own name* in accordance with the general principles of civil liability. In *Houle*, at p. 176, L'Heureux-Dubé J. noted that the company could have brought an action against the bank but had decided not to do so. But that decision did not affect the former shareholders' right to take legal action for the fault committed against them.

[104] I also disagree with my colleague's suggestion that Fiducie's action is barred by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Fiducie is not purporting to act as a creditor of the corporations, nor is it seeking a balance due from them; rather, it is arguing that it has a direct right of action against the respondents for breaches of contract they committed against it. Once again, this theoretically gives rise to a risk of double recovery, but there is no such risk in this case.

IV. Conclusion

[105] In my opinion, the courts below erred in dismissing Fiducie's MIP at the preliminary stage. The facts alleged in the MIP are sufficient to establish an interest at

this stage. At any rate, in my view, it is not clear that Fiducie does not have an interest. It is true that the proper administration of justice sometimes requires that actions that are clearly bound to fail be dismissed at the preliminary stage, including where it is clear that the plaintiff has no interest. But this drastic remedy must be administered with the greatest caution. The scarcity of judicial resources to which my colleague refers must not become a pretext for limiting access to the courts to cases in which there is a clear chance of success or to plaintiffs whose interest is not in any doubt. In the instant case, Fiducie may well have difficulty proving a sufficient interest at trial, but it should nonetheless be given the opportunity to do so. I would therefore allow the appeal with costs.

Appeal dismissed with costs, CÔTÉ J. dissenting.

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